

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

AFFYMETRIX, INC. and
GREGORY L. KIRK,

Plaintiffs,

v.

ILLUMINA, INC.,

Defendant.

Civil Action No. 11-cv-184-bbc

PLAINTIFFS' MOTION TO REOPEN

NOW COME Plaintiffs Affymetrix, Inc. and Gregory L. Kirk, by their attorneys James R. Troupis of Troupis Law Office LLC and Latham & Watkins LLP, and respectfully move the Court to reopen this case.

1. On March 14, 2011, Plaintiffs filed this action pursuant to 35 U.S.C. § 256, seeking to correct inventorship of U.S. Patent Nos. 7,510,841 and 7,612,020. (Dkt. #1.)

2. At the time the Complaint was filed, a consolidated appeal was pending before the United States Court of Appeals for the Federal Circuit (Appeal Nos. 2011-1145, -1146), in which Illumina sought to overturn the judgment of noninfringement entered in *Illumina, Inc. v. Affymetrix, Inc.*, Case Nos. 09-cv-277-bbc, 09-cv-665-bbc (W.D. Wis.) (“the prior litigation”). The Court stayed and administratively closed the present action “until the court of appeals resolves [the prior litigation],” in order to avoid issues of preclusion and other procedural matters that may arise should the inventorship issue be resolved on appeal or remanded. (Dkt. #47 at 5.)

3. This judgment of noninfringement in the prior litigation was summarily affirmed by the Federal Circuit. (Exhibit A, hereto.) The appellate court issued its mandate earlier today, on September 26, 2011. (*Id.* at 2.) Issuance of the mandate renders the appellate court's decision final and indicates that the case has come to an end. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97-98 (3d Cir. 1988).

4. With the appeal resolved, the stay of the present action should be lifted and the case reopened. Because the prior judgment was affirmed on the grounds of noninfringement, the inventorship issue in the prior litigation is moot and cannot give rise to any "questions regarding preclusion and other procedural matters." (Dkt. #47 at 5.)

WHEREFORE, Plaintiffs respectfully request the Court to reopen this case.

Dated: September 26, 2011

Respectfully submitted,

/s/ Roger J. Chin

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